Supreme Court, U.S.
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No. 95-243

In the Supreme Court of the United States

OCTOBER TERM, 1995

NORINSBERG CORPORATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
CONSTANCE A. WYNN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a regulation incorporating the standards of the Jencks Act, 18 U.S.C. 3500, required the Department of Agriculture to produce a memorandum prepared by a Department employee who testified at an administrative hearing.

2. Whether the court of appeals erred in holding that nondisclosure by the Department of certain statements covered by the standards of the Jencks Act was harmless error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B2-B13) is reported at 47 F.3d 1224. The final decision of the United States Department of Agriculture Judicial Officer (Pet. App. C1-C18) is reported at 52 Agric. Dec. 1617 (1993). The decision of the Administrative Law Judge (Pet. App. D1-D8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1995. A petition for rehearing was denied on May 12, 1995. Pet. App. A1. The petition for a writ of

certiorari was filed on August 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a New York produce dealer that received its dealer's license from the Department of Agriculture in 1975 pursuant to the Perishable Agricultural Commodities Act of 1930 (PACA or the Act), 7 U.S.C. 499a *et seq.* Pet. App. B3, B4. The Act requires dealers in perishable produce to be licensed by the Department, and to make "full payment promptly" for all produce purchases. 7 U.S.C. 499c (1988 & Supp. V 1993), 499b(4).[1] The Act authorizes the Secretary of Agriculture to revoke the license of dealers found to have committed "flagrant or repeated violations" of the prompt payment rule. 7 U.S.C. 499h(a).

1. On September 28, 1992, the Director of the Fruit and Vegetable Division of the Department of Agriculture issued a complaint charging petitioner with failing to make "full payment promptly" of $424,913.75 owed to ten suppliers for 46 lots of apples. Pet. App. B4, D1-D2.[2] Based on the number and circumstances of petitioner's PACA violations, the Secretary recommended that petitioner's license be revoked. *Id.* at B4. A hearing before an Administrative Law Judge (ALJ)

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[1] Department of Agriculture regulations, 7 C.F.R. 46.2-(aa)(5) and (11), define "full payment promptly" as payment within ten days after the day on which the produce is accepted, except where the seller and buyer agree in writing to an alternative payment schedule before entering into a transaction.

[2] At the time of the administrative hearing in this case, petitioner still owed $255,081.12 to the sellers. Pet. App. D3.

was held on July 21, 1993. *Id.* at D1. At the hearing, petitioner admitted violating the Act, but argued against license revocation as a sanction, asserting that mitigating circumstances warranted a lesser penalty. *Id.* at B4. Clare Jervis, a marketing specialist, presented the Department's recommendation of revocation at the administrative hearing. *Id.* at E2-E3. Jervis also testified that she had reviewed the investigative records in petitioner's case and prepared a brief memorandum analyzing those records. *Id.* at E9. Petitioner requested a copy of Jervis's brief memorandum pursuant to Department of Agriculture regulations providing that the production of witness statements "shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500)." 7 C.F.R. 1.41(g)(1)(iii); see Pet. App. E9. The ALJ reviewed the memorandum *in camera* and denied the request. *Id.* at E16-E17. On August 9, 1993, the ALJ delivered a bench ruling revoking petitioner's PACA license. Pet. App. D8.

Petitioner appealed to the Department's Judicial Officer.[3] The Judicial Officer upheld the revocation sanction (Pet. App. C8), but stayed his order pending disposition of the corporation's petition for review by the court of appeals. *Id.* at B-5.

2. In its petition for review in the court of appeals, petitioner challenged the revocation sanction, arguing that the Secretary abused his discretion in revoking, rather than suspending, petitioner's license.

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[3] The Secretary has delegated final decisionmaking authority in adjudicative proceedings to the Judicial Officer. See 7 C.F.R. 1.132(d), 2.35.

Petitioner also argued that it was entitled to a copy of the Jervis memorandum under the Jencks Act. Pet. App. B5-B6, B8.

The court of appeals denied the petition for review. Pet. App. B1-B13. With regard to the sanction imposed, the court held that the Secretary acted within his discretion in deciding to revoke petitioner's PACA license. *Id.* at B8. Regarding the Jencks Act claim, the court determined that the "bulk" of the brief memorandum prepared by Jervis was not related to her trial testimony and, thus, was not Jencks Act material that the Department was required to produce. *Id.* at B8-B11. The court determined that a few lines in the memorandum—statements addressing the history and status of petitioner's PACA license—did qualify as Jencks Act material, because they related to Jervis's opening testimony on the same subject. *Id.* at B12. The court held, however, that the failure to produce the document was harmless error because the licensing information in the memorandum was "limited and basically innocuous" factual information, to which petitioner had access through its own records. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the Jervis memorandum "served as the basis for making a sanction recommendation," and that, therefore, "the *entire* memorandum 'relates to' Ms. Jervis' testimony and should have been produced under the Jencks Act." That contention lacks merit.

The Jencks Act applies of its own force only in federal criminal prosecutions. See 18 U.S.C. 3500. It is relevant here only because the Department of Agriculture has elected to provide in its regulations

governing administrative adjudications that witness statements shall be made available by reference to the standards in the Jencks Act. See 7 C.F.R. 1.141(g)(1)(iii). The Jencks Act provides that, after a government witness has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement * * * of the witness in the possession of the United States which relates to the subject matter *as to which the witness has testified.*" 18 U.S.C. 3500(b) (emphasis added). Statements that address the subject matter at issue in the case, but do not relate to topics "as to which the witness has testified," do not fall within the Jencks Act's coverage, and need not be produced. See, *e.g.*, *United States* v. *Susskind*, 4 F.3d 1400, 1404 (6th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 1098 (1994); *United States* v. *Smaldone*, 544 F.2d 456, 462 (10th Cir. 1976), cert. denied, 430 U.S. 967 (1977).

In this case, the government witness's testimony covered three subject areas: (1) petitioner's possession of a PACA license; (2) phone calls made to petitioner's suppliers regarding their monetary claims; and (3) the Department's sanction recommendation. Pet. App. B10. After reviewing the Jervis memorandum, the court of appeals concluded that "[t]he great bulk of [the] memorandum does not bear directly on any of these three subjects." *Ibid.* The court's decision that statements in the memorandum that do not "relate to" Jervis's actual trial testimony are not covered by the Jencks Act is correct, and does not warrant further review.

2. The court of appeals did accord Jencks Act status to that portion of the memorandum in which

Jervis addressed the history and status of petitioner's PACA license. Pet. App. B12. The court ruled, however, that nondisclosure of that material was harmless error because petitioner had independent access to the licensing information contained in the memorandum. *Ibid.*

Contrary to petitioner's contention (Pet. 6-7), the court of appeals' finding of harmless error in this case does not conflict with *Clancy* v. *United States*, 365 U.S. 312 (1961). In *Clancy*, the Court held that where harmless error analysis is relevant to some, but not all, of a group of erroneously withheld statements, reversal is required. See *id.* at 316 ("We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to those of the other two."). Although the harmless error doctrine must be "strictly applied" in criminal prosecutions that are directly governed by the Jencks Act itself, *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976), it does not follow that an equally strict application of harmless error principles is appropriate on judicial review of an agency decision in an administrative adjudication governed by regulations that merely borrow the substantive standards of the Jencks Act. Judicial review in the latter situation is governed by the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, including its directive that, in reviewing agency action, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706.

Moreover, even in a criminal case, where information contained in the only statements deemed Jencks Act material was available to defense counsel through other sources, any Jencks Act violation was harmless. See *Rosenberg* v. *United States*, 360 U.S. 367,

371 (1959) ("when the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial."); *United States* v. *Pepe*, 747 F.2d 632, 657 (11th Cir. 1984) (failure to produce Jencks Act material already in defendant's possession was harmless error); *United States* v. *Rivero*, 554 F.2d 213, 215 (5th Cir. 1977) (same). The court of appeals' fact-specific determination in this case that information already available to petitioner did not materially differ from Jencks Act material in the Jervis memorandum does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
CONSTANCE A. WYNN
Attorneys

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